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No. 07-750

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CONEXANT SYSTEMS, INC., *et al.*,

Petitioners,

v.

HOWARD GRADEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Respondent has statutory standing under the Employee Retirement Security Income Act of 1974 as amended, 29 U.S.C. § 1101, *et seq*, ("ERISA") Section 502(a)(2), 29 U.S.C. § 1132(a)(2) to pursue claims on behalf of the Plan when: (a) he participated in the subject defined contribution plan during the time the alleged breaches of fiduciary duty occurred; (b) the alleged breaches of fiduciary duty caused losses to the Plan, diminishing the value of the Respondent's and other participants' individual accounts; and (c) as a consequence, Respondent received a benefit payout less than he would have received in the absence of the alleged fiduciary breaches.

PARTIES

The petitioners in this matter are Conexant Systems, Inc., Dwight W. Decker, Armando Geday, Robert McMullan, Michael Vishny, Balakrishnan Iyer, and Dennis O'Reilly, and J. Scott Blouin.

The respondent is Howard Graden who brought this class action on behalf of himself, the Conexant Systems, Inc. Retirement Savings Plan, and a putative class of similarly situated plan participants invested in the Conexant Systems, Inc. Retirement Savings Plan between March 1, 2004 and the present.

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INTRODUCTION

Petitioners present "no compelling reasons" for their Petition for a Writ of *Certiorari* (the "Petition") to be granted. *See* Sup. Ct. R. 10. Specifically, Petitioners fail to demonstrate that the Third Circuit's July 31, 2007 opinion and order: (a) conflicts with a decision of this Court; (b) "deepens" any split among the Circuits on the issue of participant standing; or (c) is an issue of such monumental importance to ERISA jurisprudence that it requires this Court to revisit it. Indeed, if anything, the Third Circuit's decision, and the decisions of every other Circuit to consider the issue of participant standing in the last year, restored order to an area of law sidetracked by an errant 2006 district court decision and the unfortunate ripple effects therefrom.

The Third Circuit's decision comports with ERISA and this Court's decisions in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) and *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439-41 (1999), which, when read in conjunction, demonstrate that former employees, like the Respondent, who withdrew assets from a defined contribution plan that were less than they would have been absent fiduciary misconduct, maintain a colorable claim to vested benefits still owed and, thus, standing as participants to recover plan loss under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2).[1] Petitioners would

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[1] This Court also recently denied a motion to dismiss a petition for *writ of certiorari*, previously granted, on mootness grounds where respondent argued that petitioner's cashing out of the plan deprived him of statutory standing to pursue the petition – the identical issue Petitioners now seek *certiorari* on.

have the Court ignore this clear reading of the law and find that ERISA precludes post-payout standing for former employees deprived unwittingly of the full value of their benefits as a result of fiduciary misconduct. Such a finding would effectively sever any avenue of recourse for harmed former employees and lead to a host of illogical and unjust consequences. Surely, neither Congress in enacting ERISA nor this Court in interpreting it, intended such incongruous results.

The Third Circuit is not alone in recognizing the folly of Petitioners' approach to participant standing as the Seventh and Sixth Circuits have expressly rejected the same and the First, Second, Fourth, Fifth, and Ninth have done so by implication. Indeed, not a single circuit has adopted the reasoning advanced by Petitioners and, since the circuits have spoken directly on the issue, neither has any district court. Accordingly, there is no basis for Petitioner's assertion that this Court must grant the Petition to resolve a split amongst the circuits on participant standing.

ERISA § 3(7) expansively defines "participants" to include "*any employee or former employee of an employer...who is or may become eligible to receive a benefit of any type from an employee benefit plan....*" 29 U.S.C. § 1002(7) (emphasis added). In *Firestone*, 489 U.S. at 117, this

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See Larue v. Dewolff, 450 F.3d 570 (4th Cir. 2006), *cert. granted* 2007 U.S. LEXIS 7731 (June 18, 2007), Docket No., 06-856 (September 25, 2007). Although the Court did so without opinion, it passed on the opportunity to address the issue at oral argument (held on November 26, 2007).

Court interpreted the term "participant," as it relates to former employees, as "naturally read" to include those who have a "colorable claim to vested benefits." Nowhere in ERISA, in its legislative history, nor in any authority of this Court interpreting the same, has a distinction been made between former employees with assets in a plan and those without. The determinative issue is simply whether an individual has a claim to any outstanding *benefits* potentially owed.

This Court recognized in *Hughes Aircraft*, 525 U.S. at 439-41, that vested benefits in defined contribution plan, such as the Plan here at issue, are not fixed but rather consist of the amounts properly allocated and due to an individual's account. Unlike defined benefit plans where the benefit is fixed and paid from an employer-controlled asset pool, and where participants are entitled to no more than the fixed benefit, regardless of the overall value of assets, defined contribution plans proportionately distribute any asset surplus to participants. *Id.* Such distributions are considered "vested benefits" to defined contribution plan participants and, if deficient, are subject to a claim under *Firestone*.

Simply put, Respondent is a former employee who failed to receive the full value of benefits due from his defined contribution plan account as a result of alleged fiduciary breaches. Under ERISA and this Court's decisions in *Firestone* and *Hughes Aircraft*, Respondent has a colorable claim for vested benefits and thus standing to bring an action under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2). Petitioners' arguments to the contrary are without merit.

STATEMENT OF THE CASE

This action was brought by respondent Howard Graden ("Respondent") pursuant to ERISA Sections 409 and 502(a)(2), 29 U.S.C. §§ 1109 and 1132(a)(2), against petitioners, Conexant Systems, Inc. ("Conexant" or the "Company") and certain other named and unnamed fiduciaries (collectively, the "Petitioners") of the Conexant Systems, Inc. Retirement Savings Plan (the "Plan"), who are and were responsible for the investment of the Plan's assets and administration between March 1, 2004 and the present (the "Class Period"). Pet. App. at 3a.[2] Respondent is pursuing claims on behalf of the Plan and a class of similarly situated Plan participants (the "Class") whose individual accounts suffered a diminution in value due to Petitioners' alleged breaches of fiduciary duty. Pet. App. at 5a.

Respondent alleged that the Plan fiduciaries breached their fiduciary duties owed to the Plan and its participants, thereby causing the loss of millions of dollars of Plan assets and diminishing the value of Plan participants' individual accounts. Pet. App. at 5a. Respondent seeks, *inter alia*, an order compelling Petitioners to restore to the Plan all losses resulting from their breaches. *Id.*

Respondent was invested in the Plan during the time of the alleged fiduciary breaches when the Plan suffered much of its loss. Pet. App. at 2a. His account, along with those of other Plan participants, correspondingly suffered a diminution in value. Pet.

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[2] References to the Appendix to the Petition are indicated herein as "Pet. App. at ____."

App. at 5a. When Respondent withdrew his assets (*i.e.*, vested benefits) from the Plan, he failed to receive the full value due him. Those benefits remain un-restored.

On October 12, 2005, Petitioners moved to dismiss the Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(6), 8(a) and 9(b), arguing, *inter alia*, that because Respondent was a former employee who had taken a payout from the Plan, he was not a "participant" and thus lacked standing to pursue an action on behalf of the Plan and its participants. Pet. App. at 3a. Respondent opposed the motion arguing, *inter alia*, that because he has a colorable claim to vested benefits he should have received absent Petitioners' breaches, he remains a participant for the purpose of standing to pursue claims under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), and *Firestone*. Pet. App. at 31a.

By order dated, March 31, 2006, the Honorable Stanley R. Chesler, United States District Judge, District of New Jersey, granted Petitioners' motion to dismiss. Pet. App. at 30a-42a. Thereafter, Petitioner appealed to the United States Court of Appeals for the Third Circuit. On July 31, 2007, the Third Circuit unanimously vacated the district court's order and remanded for further proceedings, holding, *inter alia*:

> ... ERISA entitles individual-account-plan participants not only to what *is* in their accounts, but also to what *should be* there given the terms of the plan and ERISA's fiduciary obligations.

> From this, it is not difficult to conclude that Graden has standing as a plan participant. As an account-holder in the Conexant plan, he was entitled to the net value of his account as it should have been in the absence of any fiduciary mismanagement. Because he colorably contends that he has yet to receive that amount, he presses a claim for the remainder of his monetary entitlement under his plan and ERISA—a claim for benefits.

Pet. App. at 9a (emphasis in original).

On September 5, 2007, Petitioners' petition for a hearing *en banc* seeking reconsideration of the panel's decision was denied. Pet. App. at 25a-26a. Their Petition followed shortly thereafter.

REASONS FOR DENYING THE PETITION

The reasons for denying the Petition are straightforward. First, the Third Circuit's decision is in every respect consistent with ERISA and this Court's prior decisions in *Firestone* and *Hughes Aircraft*. Second, the circuit courts are in accord on the issue of participant standing. Petitioners attempt to create conflict where none exists by ignoring basic ERISA principles and glossing over critical factual differences that readily distinguish the authority on which they rely. In this regard, Petitioners not only fail to address the crucial distinction between defined benefit and defined contribution plans, but they go so

far as to ignore this Court's own holding in *Hughes Aircraft* that underscores those significant differences. In the end, Petitioners cannot demonstrate a single compelling reason for the Court to revisit an area of well-settled law.

I. Petitioners' Argument On Standing Is At Odds With ERISA And The Decisions Of This Court And Those Of Every Circuit Court To Consider The Issue

Nowhere in ERISA, in its legislative history, nor in any authority of this Court or any circuit court interpreting ERISA, is a distinction made between former employees with or without assets in a plan. Under *Firestone*, the determinative issue is only whether a former employee received less than the full value of his or her benefits. Despite the fact that the Courts of Appeals for the First, Second, Third, Fourth, Fifth, Sixth, Seventh, and Ninth Circuits have expressly or implicitly rejected the argument that former employees must maintain plan investment in order to preserve participant standing, Petitioners continue to press the argument. Indeed, their argument rests almost entirely on a red-herring distinction between "benefits" and "damages." This position, however, is untenable and cannot be reconciled with the plain language of ERISA.

A. Vested Benefits In A Defined Contribution Plan Consist Of What Is In Or *Should* Be In An Individual's Account

ERISA § 3(34), defines a defined contribution plan as one that "provides for an individual account for each participant and *for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.*" 29 U.S.C. § 1002(34) (emphasis added). Unlike a "defined benefit plan" that provides for a fixed benefit unaffected by increases or decreases in the value of plan assets, a defined contribution plan must allocate all surplus assets, regardless of their source, to its participant accounts. *See Hughes,* 525 U.S. at 439-41; *see also Becker v. Weinberg Group, Inc. Pension Fund*, 473 F. Supp. 2d 48, 67 (D.D.C. 2007).

The Third Circuit, like the Second, Seventh, and Sixth, has recognized that this distinguishing feature demonstrates why a participant in a defined contribution plan has a personal stake in the outcome of litigation resulting in a plan recovering lost assets, whereas a participant in a defined benefit plan would not. Pet. App. at 10a-11a; *Guidant Harzewski v. Guidant Corp.*, 489 F.3d 799, 804-07 (7th Cir. 2007); *Bridges v. Am. Elec. Power Co.*, 498 F.3d 442, 445 (6th Cir. 2007); *Coan v. Kaufman*, 457 F.3d 250, 256 (2d Cir. 2006). As explained by the Third Circuit, since "ERISA imposes fiduciary duties on plan administrators, 29 U.S.C. § 1104, ... part of a

[defined contribution plan] participant's entitlement is the value of his account unencumbered by any fiduciary impropriety." Pet. App. at 9a.

Judge Posner, writing for a unanimous Seventh Circuit, recognized that some courts, in analyzing participant standing, have injected erroneously a benefits/damages distinction that ignores the very nature of a defined contribution plan. *Guidant*, 489 F.3d at 804. On this point, Judge Posner explained:

> Benefits are benefits; in a defined contribution plan they are the value of the retirement account when the employee retires, and a breach of fiduciary duty that diminishes that value gives rise to a claim for benefits measured by the difference between what the retirement account was worth when the employee retired and cashed it out and what it would have been worth then had it not been for the breach of fiduciary duty.

Id. at 807.

The Seventh Circuit held, "the question comes down to whether, if the plaintiffs win their case by obtaining a money judgment against [defendant], the receipt of that money will constitute the receipt of a plan benefit." *Id.* at 804. The receipt of recovered money constitutes the receipt of a benefit in defined contribution plans, because in such plans, "an employee's retirement benefit is the eventual value of

his or her account to which contributions have been made by the employer and/or the employee." *Id.*

This same sentiment was echoed by the Second and Sixth Circuits and a number of district courts. *See Bridges*, 498 F.3d at 445 (adopting *in toto* the Third and Seventh Circuits' approach to determining a cashed-out former participant's standing); *Coan*, 457 F.3d at 255-56 (recognizing that a claim that lump-sum distribution of an account balance that "would have been greater absent the defendants' breach of fiduciary duty is a claim 'for benefits' which, if 'colorable,' means that she 'may become eligible for benefits' and thus qualifies as a 'participant' under ERISA"); *In re Boston Scientific Corp. ERISA Litig.*, 506 F. Supp. 2d 73 (D. Mass. 2007)(" [T]he court is puzzled by the ... assertion that a claim for benefits lost due to imprudent fiduciary investment becomes a claim for damages once the plaintiff accepts a lump sum payment constituting the balance of her account with the relevant plan...."); *In re Polaroid ERISA Litig.*, 240 F.R.D. 65, 73 (S.D.N.Y. 2006) (holding that former employees had standing as "participants" even after their accounts had been liquidated); *Champaganie v. Kaufman*, 2007 WL 1613491, at *5 (D. Conn. June 1, 2007) (calling defendants' assertion "that a claim for benefits lost due to imprudent fiduciary investment becomes a claim for damages once the plaintiff accepts a lump sum payment" - a "red herring").[3]

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[3] In *Vartanian v. Monsanto*,14 F.3d 697, 702-03 (1st Cir. 1994), the First Circuit also declined to interpret ERISA's standing requirements so narrowly, finding that "given the broadly inclusive scope of the ERISA statute, and its preclusion of all other judicial recourse," it would be inconsistent with

Just prior to this submission, the Sixth Circuit again addressed the issue in *Tullis v. UMB Bank*, 2008 WL 215535, at *5 n.8 (6th Cir. Jan. 28, 2008), where it stated:

> [t]he fact that [plaintiff] already received a distribution from the plan does not affect the analysis. Any additional money recovered will be distributed to the plaintiff in the form of an increased benefit. Thus, [plaintiff] is a participant within the meaning of 29 U.S.C. § 1002(7) with standing to sue under section § 1132(a)(2) because he is a "former employee" who is or may be "eligible to receive a benefit" from the plan.

Although it has not yet spoken directly to the issue of participant standing, the Fourth Circuit both has permitted a former employee who accepted a benefit payout to bring an action as a participant under ERISA § 502(a)(2), *see Smith v. Sydnor*, 184 F.3d 356, 359 (4th Cir. 1999), and determined that participants in a terminated plan had standing, *see Wilmington Shipping Co. v. New England Life Ins. Co.*, 496 F.3d 326 (4th Cir. 2007). Consequently, it would be entirely inconsistent for the Fourth Circuit

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ERISA to reject standing, where, as here, "the employee shows that in the absence of the employer's breach of fiduciary duty he would have been entitled to greater benefits than those which he received, then his receipt of payment cannot be used to deprive him of "participant" status and hence standing to sue under ERISA."

to rule any other way on this issue since there is no material difference between a former employee removing all known assets from a plan and a plan extinguishing the investment of a former employee. In either circumstance, the former employee no longer has assets in the plan yet retains standing to sue.

Notably, the Fourth Circuit in *Wilmington Shipping* held that ERISA § 502(a)(2) "grants plan participants the right to sue for breach of fiduciary duty *without qualification*. It does not say that a plan participant can sue for breach of fiduciary duty 'until plan termination' or 'before plan termination,' just that a participant can sue for breach of fiduciary duty." 496 F.3d. at 338 (emphasis added). ERISA does not speak to participant standing in terms of the contemporaneous plan investment but rather in terms of entitlement. *See* 29 U.S.C. § 1002(7); *Firestone*, 489 U.S. at 117. As pointed out by the Fourth Circuit, where the loss results from a fiduciary breach, such entitlement is "without qualification." *Wilmington Shipping*, 496 F.3d at 338.

Similarly, in *Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock*, 861 F.2d 1406, 1409-11 (9th Cir. 1988), the Ninth Circuit determined that former employees, who had received their benefits, were "participants" under ERISA. In *Amalgamated*, the court found that plaintiffs could sue for disgorgement of plan assets since plan assets were intended for the sole benefit of the plan's participants. *Id.* at 1416. In particular, the court held the disgorged assets constitute "benefits" under ERISA in that:

> A fiduciary has no legal right to retain profits obtained through breach of the duty of loyalty to an ERISA plan. It is appropriate for plan participants and beneficiaries to receive the fiduciary's ill-gotten profits *because it was their plan benefits that were put at risk* when the fiduciary allegedly breached the duty of loyalty and used plan assets to further non-plan interests....
>
> In the circumstances of this case, were we to hold that payment of plan benefits cuts off the standing to sue of plan beneficiaries, we would, in effect, be saying that a fiduciary who (1) breaches the duty of loyalty to an ERISA plan, and (2) seeks to profit personally from that breach by terminating the plan, has the power to deprive plan beneficiaries of standing to sue the fiduciary for misuse of plan assets.

Id. at 1418 (emphasis in original).

Although the plan in *Amalgamated* was not the type of defined contribution plan at issue here, the Ninth Circuit's analysis demonstrates that it would likely rule the same way here. Indeed, where, as here plan assets are intended for the sole benefit of the plan's participants, a benefit payout should not bar participants from obtaining benefits to which they would have been entitled absent fiduciary misconduct.

In *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan*, 883 F.2d 345 (5th Cir. 1989), the Fifth Circuit likewise held that a former employee who accepted a lump sum payout was a participant under ERISA. Finding the claim was for "vested benefits," the court pointed out that:

> it is plain that here the class members seek their share of the difference between the price the representatives received for their shares and the fair market value of those shares at the time they were sold. In other words, the representatives have a claim for an ascertainable amount allegedly owed them at the time they received their lump sum. We do not believe that Congress intended to deny such plaintiffs standing to sue under ERISA.

Id. at 350. Here, Respondent similarly seeks the difference between the benefits he received and the true value of his benefits in the absence of fiduciary misconduct. As discussed below, where the *Sommers* court went astray was its undertaking of a problematic and unprecedented analysis of benefits versus damages. *Id.* at 349-50. The Fifth Circuit's core holding, however, remains that a former employee who accepted a benefit payout does not lose standing to sue as a participant.

Finally, further support can be found in the First Circuit's decision in *Crawford v. Lamantia*, 34 F.3d 28 (1st Cir. 1994). There, the court denied standing to a former employee not because he

accepted a benefit payout but rather because he could not demonstrate that a recovery would result in a distribution to participant accounts. *Id.* at 33. In so holding, the panel of the First Circuit remarked:

> *Unlike the claimants in Sommers, plaintiff has failed to show that defendants' alleged breach of fiduciary duty had a direct and inevitable effect on his benefits.* Defendants borrowed funds from ADL to acquire a set number of ADL New Shares, *i.e.*, 546,520. Had defendants not overvalued the shares, they would not have borrowed as much money from ADL. Instead, a recalculation of the price of the stock would have resulted only in a smaller loan, lower principal and interest payments to be paid quarterly by ADL, and the same number of New Shares placed in the suspense account. *It would not have resulted in a similar loan being made to the ESOP with any excess cash to be distributed to the accounts of the participants. The borrowed funds were not available for distribution; they were to be used exclusively to buy stock, or in the alternative, to pay back the loan.*

Id. (Emphasis added). Had the First Circuit been presented with a situation like the present one – where Respondent alleges that recovery by the Plan *will* result in a distribution to the Plan's participants

– it seems apparent the court would have found a sufficient basis for standing.

B. The *Sommers*, *Crawford*, *Kuntz* And *Mitchell* Cases Do Not Manifest A "Split" Among Circuits

Petitioners' argument that a significant split among the Circuits exists on the issue of participant standing, is entirely without merit. Pet. App. at 11-21. Indeed, only one of the cases Petitioners cite, *Sommers*, varies slightly, albeit not irreconcilably, from the remainder of circuits to address the issue. Moreover, the *Crawford* case, as noted above, is in accord with other circuits, and both *Kuntz v. Reese*, 760 F.2d 926 (9th Cir. 1985), *vacated*, 785 F.2d 1410 (9th Cir.), *cert. denied*, 479 U.S. 916 (1986), and *Mitchell v. Mobile Oil Corp.*, 896 F.2d 463 (10th Cir. 1990), are readily distinguishable on the facts.

As discussed above, the Fifth Circuit in *Sommers* held that a former employee who accepted a lump-sum payout nonetheless had a colorable claim to vested benefits. 883 F.2d at 350. The Fifth Circuit faltered, however, when, without any basis in ERISA or other authority, it crafted a distinction between benefits and damages premised on an analysis of ascertainability. *Id.* Although it reached the correct result, the court's fundamental flaw was failing to understand the nature of plan-specific benefits. Had it done so, the *Sommers* court would have recognized that a plan having a variable benefit tied to the value of plan assets, like a defined contribution plan, is entirely distinct from a plan having a fixed and federally insured benefit unrestricted by the value of

plan assets, like a defined benefit plan. *See Hughes Aircraft*, 525 U.S. at 439-41.

In dismantling the *Sommers* benefits/damages distinction, the Seventh Circuit in *Guidant* correctly noted that:

> [t]he idea that pension "benefits" refer to an amount specified in the plan confuses defined-contribution plans with defined-benefit plans. The latter specify a formula for computing benefits. The former specify a formula for making contributions to the retirement account, but the benefits themselves are not specified; they are just whatever is in the account when it cashed out, provided the formula is properly applied.

489 F.3d at 805. A claim for vested benefits in a defined contribution plan, therefore, would be for "*whatever would have been there had the plan honored the employee's entitlement*, which included an entitlement to prudent management." *Id.* at 804-05. Judge Posner further noted that "there is nothing in ERISA to suggest that a benefit must be a liquidated amount in order to be recoverable." *Id.* at 807.

In reaching the same conclusion, the Third Circuit held, "it is true that the *Sommers* Court opined that someone asserting a claim for an 'unascertainable amount" would not state a claim for benefits.... This portion of *Sommers*, however, is incorrect." Pet. App. at 18a-19a (citing *Guidant*, 480

F.3d at 807). And, Petitioners' argument was again rejected by the Sixth Circuit in the *Tullis* case where the court, tossing semantics aside, stated:

> Although the face of the complaint does not include the exact words "losses to the plan" (*i.e.* that the plan suffered damages), it clearly indicates that the plaintiffs, as participants in an ERISA-governed plan, are seeking recovery for losses to their plan accounts caused by fiduciary breaches. Any assets recovered from the defendant would be payable to the plaintiffs only insofar as they are participants in the plan whose account assets were diminished by the alleged reaches of fiduciary duty. Moreover, the complaint clearly puts the defendant on notice that the plaintiffs are seeking recovery for losses that occurred to their plans.

2008 WL 215535, at *5. Other courts too have recognized the *Sommers* court's error in drawing a benefits/damages distinction for claims under ERISA § 502(a)(2) without regard to plan type. *See Bridges*, 498 F.3d at 445 (adopting reasoning of *Guidant* and *Conexant in toto*); *Champaganie*, 2007 WL 1613491, at *8 ("The court sees no logical reason why such a claim seeks an ascertainable benefit when the plaintiff refuses a lump sum, but the very same claim seeks an unascertainable damage award once the plaintiff accepts a lump sum."); *In re Boston*

Scientific, 506 F. Supp. 2d at 73 (no basis for a distinction between benefits and damages).[4]

The *Mitchell* case, which concerned a defined benefit plan, illustrates why the standing analysis must begin with the nature of the plan at issue. 896 F.2d at 466.[5] In *Mitchell*, the plaintiff claimed, *inter alia*, that he was forced into a retirement decision that resulted in his inability to obtain benefits he claimed he would have earned had he not retired. *Id.* at 474. Unlike the present case, the *Mitchell* plaintiff did not claim his lump-sum payout was deficient and that he was entitled to his pro-rata share of recovered plan assets but rather that certain plan amendments blocked his ability to earn future, "not yet vested," benefits. *Id.* Accordingly, the court found the plaintiff did not have a colorable claim to vested benefits. *Id.*

In *Kuntz*, plaintiffs who received their vested pension benefits alleged they were entitled to damages after the plan's fiduciaries falsely represented the amount of benefits plaintiffs could

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[4] Even if the Court were inclined to adopt the benefits/damages distinction, the amount sought in this matter is by no means unascertainable. Indeed, as the Third Circuit recognized that "if [plaintiff] succeeds on the merits, the District Court will look at the prudent investment alternatives that the [plan] offered during this period to determine what the [investors] would have earned but for Conexant's breach. Pet. App. at 19a (citing *Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985).

[5] The Mobil plan provided for a benefit in the form of an annuity (*i.e.*, fixed) and later included an option for a "lump-sum" payment accelerating the annuity to a single payout. *Id.*

expect to receive and "failed to comply with ERISA requirements for disclosing pension plan documents." *Kuntz*, 760 F.2d at 926. As to the first part of their claim, the plaintiffs did not allege failure to receive their full vested benefits only that they expected more (not that there was more to be had). *Id.* This is quite distinct from a claim, like the Respondent's, that the Plan is in a position to recoup lost assets and that a recovery would inure as a benefit to him. The latter part of *Kuntz* plaintiffs' claim, concerning the plan fiduciary's failure to provide plan documents, entitled them to statutory damages (not benefits) under ERISA § 502(c), 29 U.S.C. 1132(c). Respondent makes no such claim in this case.

Because *Sommers*, *Crawford*, *Mitchell*, and *Kuntz* are either factually distinguishable or, at best, supportive of Respondent's argument, Petitioners cannot demonstrate any "split" among the circuits that necessitates this Court's intervention. Consequently, the Petition should be denied.

II. Rejection Of Statutory Standing Will Lead To Absurd And Inequitable Results Antagonistic To The Remedial Purpose Of ERISA

In enacting ERISA, Congress pledged "to protect . . . the interests of participants in employee benefit plans . . . by establishing standards of conduct, responsibility, and obligations for fiduciaries of employee benefit plans . . . by providing for appropriate remedies, sanctions, and *ready access to the Federal courts*." ERISA Section 2(b), 29 U.S.C. §

1001(b) (emphasis added). With respect to ERISA's standing requirement:

> ERISA's legislative history indicates that *Congress intended the federal courts to construe the statutory standing requirements broadly in order to facilitate enforcement of its remedial provisions.*
>
> The enforcement provisions have been designed specifically to provide both the Secretary [of Labor] and participants and beneficiaries with broad remedies for redressing or preventing violations of the [Act].... The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts *and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law or recovery of benefits due to participants.*

Vartanian, 14 F.3d at 702 (emphasis added).

Petitioners' argument is devoid of any discussion concerning the vital remedial purpose underlying ERISA and the numerous authorities that emphasize the need to broadly construe standing under the statute's remedial provisions. The constrained view of standing advanced by Petitioners so directly contravenes Congress's goals in enacting ERISA that adoption by this Court would set back fiduciary policing policy to a pre-ERISA

period.[6] Indeed, it is axiomatic that current employees are loathe to sue their employers out of fear of reprisals, so it is precisely former employees, like the Respondent, who are best positioned to enforce the remedial provisions of ERISA.

In addition to frustrating the very purpose of ERISA, rejecting standing under these circumstances would lead to a host of absurd and inequitable results. For instance, employees who unwittingly withdraw their assets from a plan that would have been greater absent fiduciary misconduct, will be left with no legal recourse whatsoever as a consequence of ERISA's sweeping preemption. 29 U.S.C. § 1144(a). Likewise, in order to evade liability for misconduct causing plan loss, fiduciaries could simply: (a) terminate a plan, which does not constitute a fiduciary act (*Am. Flint Glass Workers Union, AFL-CIO v. Beaumont Glass Co.*, 62 F.3d 574, 579 (3d Cir. 1995)); (b) distribute "a lump sum and terminat[e] benefits before the employee can file suit" (*Vartanian*, 14 F.3d at 702); (c) offer attractive severance incentives; or (d) "simply [pay participants] their vested benefits" (*Rankin v. Rots*, 220 F.R.D. 511, 519-20 (E.D. Mich. 2004)).

Moreover, if the Court were to reverse the Third Circuit's holding, former employees would be forced to maintain assets in a plan in perpetuity, even while facing substantial investment loss and/or

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[6] As the Court emphasized in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 141 n.8 (1985), "the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators and that ERISA was designed to prevent these abuses in the future."

company insolvency, on the chance that misconduct will be discovered at some point in the future. Even if participants are actually aware of fiduciary misconduct, they would be obligated to continue plan investment under the fiduciary eye of those who have already breached their trust. In either scenario, participants are left in a Catch-22 where they cannot reasonably protect their retirement savings or effectively mitigate their losses.[7]

Finally, since the Plan is entitled to total recovery under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) (irrespective of the number of current participants), any allocation would be necessarily inequitable as it would go exclusively to those with assets currently in the Plan. Former employees without assets in the Plan, yet whose benefits were equally diminished by the same fiduciary misconduct, would get nothing. As the Third Circuit recognized:

> This would be a serious problem for an individual account plan because all of the plan's money is allocated to individual accounts; thus if the plan recovers money allocable to individuals who no longer have accounts and cannot get standing for the imposition of a constructive trust in their favor, it is unclear what the plan

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[7] Moreover, defined contribution plans are designed to be portable, meaning that participants can change jobs and take their retirement benefits with them by, *inter alia*, rolling their savings into another 401(k) account or an IRA. Placing this type of constraint on participant accounts would frustrate the very purpose of the plan design.

> would be entitled to do with the money.... The sensible holding, therefore, is that former employees whose benefits would be made whole by a restoration of losses to the plan are participants with standing to sue on behalf of the plan-and take part in any recovery.

Pet. App. at 20a.

A rejection of participant standing for former employees who accepted a deficient benefit payout simply cannot be reconciled with ERISA policy, this Court's prior decisions, or notions of common sense and fairness. Consequently, the Petition should be denied.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that this Court should deny the petition for *writ of certiorari* to the Third Circuit as Petitioners have advanced no compelling justification supporting the same.

Respectfully submitted,

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